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No. 02-1624

IN THE

Supreme Court of the United States

ELK GROVE UNIFIED SCHOOL DISTRICT, *et al.*
Petitioners,

v.

MICHAEL A. NEWDOW
Respondent,

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

Brief of *Amici Curiae*
The American Humanist Association
The Association of Humanistic Rabbis
The Humanist Society
The HUUmanists
The Society for Humanistic Judaism
In Support of Respondent

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100 Cong. Rec. 2, 1700 (Feb. 12, 1954).. 21

100 Cong. Rec. 7, 8618 (June 22,1954).. 21

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H. Res. 459, 107th Cong., 148 Cong. Rec. 125-4136 (June 27, 2002). 29

S. Res. 292, 107th Cong., 148 Cong. Rec. S6105-6106 (June 26, 2002). 29

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OTHER AUTHORITIES

Carl Hulse, *Lawmakers Vow to Fight Judge's Ruling On the Pledge*, N.Y. Times A20 (June 27, 2002). 29

Charles Gregory Warren, *No Need to Stand on Ceremony: The Corruptive Influence of Ceremonial Deism and the Need for Separationist Reconfiguration of the Supreme Court's Establishment Clause Jurisprudence*. 54 Mercer L. Rev. 1669 (2003). 18, 21-22 26,28-29

Encarta Encyclopedia Standard 2004 27

The Graduate Center of the City University of New York, *American Religious Identification Survey* (2001) 27

John E. Thompson. *What's the Big Deal? The Unconstitutionality of God in the Pledge of Allegiance*, 38 Harv. C.R.-C.L. L. Rev. 563 (2003). 7, 21, 26, 28

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Matthew 6:5-6 (New Intl.) 5

Random House Webster's Unabridged Dictionary 1486 (2nd ed. 1998). 6

Prof. Peter Brandon Bayer, *Is Including "Under God" in the Pledge of Allegiance Lawful?: An Impeccably Correct Ruling*, 11 Nevada Lawyer 8 (2003). 26

Survey by the Gallop Organization for CNN/*USA Today* (December 9-12, 1999). 27

U.S. Census Bureau, Population Estimates Program, Population Division (June 28, 2000). 27

U.S., Russia Continue Joint Efforts to Fight Terrorism, The White House *(June 2002)* <http://www.whitehouse.gov/news/releases/2002/06/20020627-3.html>. 30

INTEREST OF AMICI CURIAE[1]

The American Humanist Association (AHA) is the oldest and largest Humanist organization in the nation, dedicated to ensuring a voice for those with a positive nontheistic outlook. Humanism is a progressive philosophy of life that, without supernaturalism, affirms our ability and responsibility to lead ethical lives of personal fulfillment that aspire to the greater good of humanity. The mission of the AHA is to promote the spread of humanism, raise public awareness and acceptance of humanism and encourage the continued refinement of the humanist philosophy.

The AHA provides a unique viewpoint concerning the coercion involved in reciting the Pledge of Allegiance,[2] as well as the history of religious freedom in the United States of America. AHA leadership feels that this case addresses core Humanist concerns about compassion, respect, egalitarianism and rational analysis. Many AHA members with children in public schools where the Pledge of Allegiance is recited are especially concerned about the outcome of this case. The AHA wishes to bolster the principle of church-state separation and the separation of government from religion and ideology, especially in the public schools, in order to prevent our own disfranchisement, as well as to best allow for religious liberty in America.

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[1] The AHA files this brief with the consent of all parties. The letters granting consent are being filed concurrently. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amici curiae*, their members, or their counsel made a monetary contribution specifically for the preparation or submission of this brief.

[2] The AHA addresses in this brief only the second question under review: "Whether a public school district policy that requires teachers to lead willing students in reciting the Pledge of Allegiance, which includes the words 'under God,' violates the Establishment Clause of the First Amendment, as applicable through the Fourteenth Amendment."

The Association of Humanistic Rabbis is the national professional organization of ordained rabbis serving congregations and other organizations within the Humanistic Jewish movement.

The Humanist Society is a non-profit, religious organization that certifies individuals in communities throughout the country to provide ceremonial observances of the significant occasions of life. Founded by former Quakers in 1939, the Humanist Society trains and ordains its own ministry, who upon ordination were then accorded the same rights and privileges granted by law to the priests, ministers, and rabbis of traditional theistic religions.

The HUUmanists are an independent affiliate of the Unitarian Universalist Association. Within this context HUUmanists practice, promote, enhance, and enjoy Humanism; provide a continental organization for Humanists; and defend and protect Humanism and freedom of thought. HUUmanists achieve these goals by arranging programs, forums, and lectures; publishing Humanist writing to give voice to Humanist values; encouraging the establishment of local Humanist groups, and maintaining a Humanist presence on the Internet. Founded in 1962, the HUUmanists' primary publications are the semi-annual journal *religious humanism* and the quarterly newsletter *HUUmanists News*.

The Society for Humanistic Judaism is the central body of the national Humanistic Jewish movement. The Society's mission is to mobilize people to celebrate Jewish identity and culture consistent with a humanistic philosophy of life. The Society assists in organizing and supporting congregations and in providing a voice for its members.

Amici file this brief with the consent of all parties. The letters granting consent are enclosed herewith.

SUMMARY OF ARGUMENT

The current version of the Pledge of Allegiance, as amended in 1954 to include the phrase "under God," violates the Establishment Clause of the First Amendment. This Court, despite discussing the Pledge in *dicta*, has never analyzed its constitutionality in its own unique circumstances.

The Pledge is not ceremonial deism as defined by this Court. Reciting the Pledge is an active swearing of loyalty to one's country, not a passive reading or even reciting of a historical document. Furthermore, the phrase "under God," like all other phrases in the Pledge, has a distinctive meaning: that this country is presently a nation "under God," not a historical acknowledgement that it was founded under a god. The late addition of the phrase, along with the intent of Congress for adding it, also distinguishes it from ceremonial deism.

The use of the current version of the Pledge in public schools violates this Court's coercion analysis. Reciting "under God" is a religious act. Children, while theoretically having the right to opt out of reciting the Pledge, may not do so because of fear of exposure as outsiders, because they do not have the capacity to do so, or because they wish not to appear unpatriotic to their teacher and classmates. Furthermore, the wish of parents for their children not to recite the Pledge may be ignored, indoctrinating them against the parents' will.

The current version of the Pledge also fails the endorsement test. The intent of the 1954 Congress and Executive Branch to have children "proclaim ... the dedication of our Nation and our people to the Almighty" is clear. 100 Cong. Rec. 7, 8618 (1954) (statement of Sen. Ferguson incorporating signing statement of President Eisenhower). All stated intents of Petitioner to use the Pledge can be achieved with the pre-1954 version. The effect of "under God" is to expose outsiders and

favor those who follow the state-chosen monotheistic belief. The Pledge violates both prongs of the endorsement test.

If the Court finds that current First Amendment jurisprudence does not invalidate the current form of the Pledge, it should reconsider its analysis with the basic constitutional rights of religious minorities in mind.

ARGUMENT

This Court has never directly analyzed the constitutionality of the current version of the Pledge of Allegiance – as amended by Congress in 1954 to include "under God" – under the Establishment Clause of the First Amendment, an "extraordinarily sensitive area of constitutional law." *Lemon v. Kurtzman*, 403 U.S. 602, 611 (1971). While the Court has "considered in *dicta* … the [P]ledge," *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 602 (1989), the current version has not appeared before the Court until now.

Therefore, despite the contention of the Solicitor General that this Court has used the Pledge of Allegiance as a "component of [its] well-established rationale" in past Establishment Clause cases, Br. United States at 33, the Court has never sufficiently scrutinized the current version of the Pledge in the manner required to use it as such.[3] "'Every government practice must be judged in its unique circumstances to determine whether it [endorses] religion.'" *Allegheny, 492 U.S.* at 595 (quoting *Lynch v. Donnelly*, 465 U.S. 694 (1984) (O'Connor, J. concurring)). Once this Court directly evaluates the Pledge under the First Amendment, it should find it a clear violation of the Establishment Clause as a government action that endorses religion, more specifically the theological concept

[3] The Court's prior decision in *West Virginia St. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), dealt with the pre-1954 version of the Pledge of Allegiance, which did not include the phrase "Under God."

of monotheism, and coerces polytheist and nontheist children to follow the state-endorsed religion or expose themselves as outsiders and subject themselves to ridicule.

I. The Current Version Of The Pledge Of Allegiance Is Not "Ceremonial Deism" As Defined By The Court.

This Court has classified certain state-endorsed religious references as ceremonial deism, falling outside the confines of the Establishment Clause because of their historical context, "'legitimate secular purposes of solemnizing public occasions, [and] expressing confidence in the future.'" *Wallace v. Jaffree*, 472 U.S. 38, 78 n. 5 (1985).(quoting *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring)). While *Amici* do not endorse the concept of ceremonial deism as an exception to analysis under the Establishment Clause,[4] it instead will distinguish the Pledge of Allegiance from ceremonial deism as defined by this Court.

A. The Pledge Of Allegiance, Unlike Forms Of Ceremonial Deism, Is An Active Expression Of One's Own Beliefs.

The Court typically defines ceremonial deism as a historical writing or a traditional ritual devoid of its original meaning,[5]

[4] Amici believe that religious references currently defined as ceremonial deism, if evaluated under the Establishment Clause in lieu of exemption from such intensive analysis, would fail First Amendment scrutiny. For instance, "if the Court were to judge legislative prayer through the unsentimental eye of our settled doctrine, it would have to strike it down as a clear violation of the Establishment Clause." *Marsh v. Chambers*, 463 U.S. 783, 796 (1983) (Brennan, Marshall, JJ., dissenting). However, Amici do not believe that this issue is immediately before the Court in this case.

[5] Of course, many monotheists are also insulted by the idea of secularized religion created by ceremonial deism. *See, e.g.*, Matthew 6:5-6 (New Intl.) ("And when you pray, do not be like the hypocrites, for they love to pray standing in the synagogues and on the street corners to be seen by men. I tell you the truth, they have received their reward in full. But when you pray, go

not as a declaration of one's own feelings of patriotism for one's country. The Ninth Circuit distinguished the Pledge of Allegiance from forms of ceremonial deism in *Newdow II*:

> The Pledge differs from the Declaration and the anthem in that its reference to God, in textual and historical context, is not merely a reflection of the author's profession of faith. It is, by design, an affirmation by the person reciting it. "I pledge" is a performative statement.

Newdow v. U.S. Congress (Newdow II), 328 F.3d 466, 489 (9th Cir. 2003).

Indeed, this Court itself has defined ceremonial deism as unthreatening because of its passive nature.[6] However, the Pledge of Allegiance is active, not passive. The Random House's Webster's Unabridged Dictionary defines "pledge" as "a solemn promise or agreement to do or refrain from doing something." *Random House Webster's Unabridged Dictionary* 1486 (2nd ed. 1998). To promise through regularly reciting

into your room, close the door and pray to your Father, who is unseen. Then your Father, who sees what is done in secret, will reward you."); *Lee v. Weisman*, 505 U.S. 577, 594 (1992). ("the embarrassment and the intrusion of the religious exercise cannot be refuted by arguing that these prayers, and similar ones to be said in the future, are of a *de minimis* character. To do so would be an affront to the rabbi who offered them and to all those for whom the prayers were an essential and profound recognition of divine authority."); *Allegheny*, 492 U.S. at 650-51 ("Some devout Christians believe that the crèche should be placed only in reverential settings, such as a church or perhaps a private home; they do not countenance its use as an aid to commercialization of Christ's birthday." (Stevens, J. concurring in part and dissenting in part)).

[6] In upholding a holiday display in *Lynch v. Donnelly*, the Court explained that "[t]he crèche [in the display], like a painting, is passive." *Lynch*, 465 U.S. at 685.

written words differs from simply studying historical documents such as the Declaration of Independence. "In the case of the Pledge, the recited words are obviously meant to express the children's *own* beliefs ... That is exactly why schoolchildren have the right not to speak the words." John E. Thompson. *What's the Big Deal? The Unconstitutionality of God in the Pledge of Allegiance*, 38 Harv. C.R.-C.L. L. Rev. 563, 585-86 (2003) (referring to this Court's decision in *Barnette* that struck down mandatory recitation by public school children of the pre-1954 version of the Pledge).

The Pledge of Allegiance is therefore unique from Court-recognized forms of ceremonial deism such as the national motto, predominately secularized Christmas displays, and even legislative prayer,[7] and this Court should evaluate it differently.

B. All Phrases In The Current Version Of The Pledge Of Allegiance, Including "Under God," Have Distinctive, Independent Meaning.

To argue that Congress intended the addition of "under God" in 1954 simply to describe the motivation of the Founders defies the very purpose of the Pledge of Allegiance. As the Ninth Circuit stated in *Newdow II*, to "recite the Pledge is not to describe the United States; instead, it is to swear allegiance to the values for which the flag stands: unity, indivisibility, liberty, justice, and – since 1954 – monotheism." *Newdow II*, 328 F.3d at 487. Each statement in the Pledge of Allegiance has carefully been chosen to portray a unique endorsement; "under God" is no different.

[7] "Legislative prayer does not urge citizens to engage in religious practices, and on that basis could well be distinguishable from an exhortation from government to the people that they engage in religious conduct." *Allegheny*, 492 U.S. at 603 n. 52.

The Pledge of Allegiance currently reads: "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all." 4 U.S.C. § 4 (1998). When a person recites the Pledge, he or she affirms his or her loyalty to both the flag and the country ("the Republic") that it represents: a country united in its citizenry ("indivisible"), that offers freedom and protection to those citizens ("liberty and justice for all"), and that recognizes a single divine entity as its ultimate authority ("under God"). Note that the 1954 addition to the Pledge does not state that it was "founded under God," as supporters of the inclusion argue as its intention. It instead states that this country is *presently* a nation "under God."

Therefore, this Court cannot dismiss the current version of the Pledge as a historical acknowledgment of the beliefs of the Founders, for it instead denotes an ever-present statement that this country *is* one ruled under a monotheistic god, a statement affirmed daily by public school students in this country.

C. The Fact That Congress Later Added The Phrase "Under God" To The Original Pledge Of Allegiance, As Well As The Intent Behind The Addition, Distinguish It From Forms Of Ceremonial Deism.

The historical documents of our nation that reference a deity, such as the Declaration of Independence and the Gettysburg Address, have not been altered from their original form. The Pledge differs in this regard, for the religious endorsement of "one nation under God" in the current version of the Pledge did not exist in the original codified version. This fact, along with the intent of Congress when adding the phrase, make this case about more than mere ceremonial deism.

Petitioner and its *amici* argue that this Court must evaluate the current Pledge in its entire context, without examining the phrase "Under God" alone. The Solicitor General in particular

cites *Lynch* and *Allegheny* to support this contention, stating that the examination by this Court of holiday displays in their entirety, particularly after the addition of the menorah in *Allegheny*, requires the Court to consider the Pledge in its entirety as well. Br. United States at 40. The menorah in *Allegheny*, however, was added to the display a mere month after the initial Christmas tree was decorated.[8] In *Lynch*, the crèche had been included with the display for "40 or more years." *Lynch*, 465 U.S. at 671. Furthermore, the stated intent of adding the crèche and the menorah—to recognize religious diversity—flies directly in the face of the reason Congress amended the Pledge: to stifle beliefs other than monotheism.[9]

Congress added "under God" to the Pledge of Allegiance 12 years after its initial codification. This Court struck down a similar modified statute in *Wallace v. Jaffree*, 472 U.S. 38 (1985), in which the government added "or voluntary prayer" to a public school moment of silence statute merely *three years* after the original statute was passed. The Court concluded that the legislative history clearly indicated that the addition itself, along with the intent of the legislature in enacting the modified statute, were either "to convey a message of state endorsement and promotion of prayer or ... for no purpose." *Id.* at 59. The facts in *Wallace* are directly comparable to those of this case – a single, religious phrase added to a statute with the intent to endorse one form of religion over nonreligion – requiring similar analysis to that used in *Wallace*.

This Court in *Allegheny* also contrasted, in *dicta*, the holiday display in that case to a similar hypothetical one in a

[8] The tree was decorated on November 17, 1986. *Allegheny*, 492 U.S. at 582-83. The menorah was added on December 22, 1986. *Id.* at 587.

[9] The anti-atheistic motivation of the 1954 Congress is discussed *infra* on page 20.

public school setting,[10] distinguishing that case from this one. It based this distinction on the impressionability of the young audience, as well as their susceptibility to coercion. *Id.* at 620. The Court therefore should apply a stricter analysis in this case than it did in *Allegheny* or *Lynch*; specifically, it should apply the coercion analysis used in *Lee v. Weisman*.

II. The Use Of The Current Form Of The Pledge Of Allegiance In Public Schools Coerces Children Into Accepting A Religion Through Fear, Thus Violating The Establishment Clause.

In evaluating the Establishment Clause, this Court has repeatedly declared that "[t]he First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968). Furthermore, this Court has interpreted the Establishment Clause to forbid the state from coercing its citizens to participate in a religious belief:

> [A]t a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which "establishes a [state] religion or religious faith, or tends to do so."

Lee, 505 U.S. at 587 (quoting *Lynch*, 465 U.S. at 678).

When the citizens in question are elementary and secondary students in a public school setting, this Court strengthens its evaluation when coercion is at issue.[11] Concerns of intimidation

[10] "For example, when located in a public school, such a display might raise additional constitutional considerations." *Id.* at 620 n. 69.

[11] *E.g.*, *Lee*, 505 U.S. at 592 ("there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."); *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987) ("The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools" because of the "special context of the public elementary and secondary school system.").

and indoctrination are most pronounced in public schools because of "a particular risk of indirect coercion." *Id.* at 592.[12]

The recitation of the statement "under God" is a religious act. This Court need not classify the phrase as a prayer to render it an unconstitutional establishment of religion, as Petitioner and its *amici* argue.[13] As the Ninth Circuit stated in *Newdow II*, "[i]n the context of the Pledge, the statement that the United States is a nation 'under God' is a profession of a religious belief, namely, a belief in monotheism." *Newdow II*, 328 F.3d at 487. "Under God" is a clear recognition of the apparent authority of monotheism over the United States, and thus warrants review under the Establishment Clause.

[12] This Court has distinguished public schools from the settings and facts of cases in which the Court declared that the laws at issue did not establish religion. *See, e.g., Marsh*, 463 U.S. at 792 ("Here, the individual claiming injury by the practice is an adult, presumably not readily susceptible to religious indoctrination." (internal quotations omitted)); *Lee*, 505 U.S. at 596 (further distinguishing *Marsh* because of the "[i]nherent differences between the public school system and a session of a state legislature."); *Zorach*, 343 U.S. at 311 ("No one is forced to go to the religious classroom and no religious exercise or instruction is brought to the classrooms of the public schools ... If in fact coercion were used .... a wholly different case would be presented.").

[13] Many school-context Supreme Court cases have dealt with endorsements of religion that were based in religious acts other than prayer. E.g., *Epperson v. Arkansas*, 393 U.S. 97 (1968) and *Edwards v. Aguillard*, 482 U.S. 578 (1987) (both invalidating statutes that affected the teaching of evolution in school because it conflicted with the majoritarian religious belief); *West Virginia St. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (striking down compulsory flag salute based on the violation of a tenet of the Jehovah Witness faith).

A. State Action Supporting A Religious Act Clearly Exists In This Case, Thus Warranting Review Under The Establishment Clause.

This case presents a clear illustration of state coercion under the test established by this Court in *Lee*. State actors – Petitioner, a public school, in conjunction with the state – have placed vulnerable and impressionable children in the position of either participating in a religious act, or else exposing their minority status as non-monotheists:

> School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents "that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."

Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309-10 (2000) (quoting *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)).

Thus, those students subject themselves to ridicule and alienation by both their peers and authority figures in violation of their Constitutional rights. The California statute in question states:

> In every public elementary school each day during the school year at the beginning of the first regularly scheduled class or activity period at which the majority of the pupils of the school normally begin the schoolday, there shall be conducted appropriate patriotic exercises. The giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy the requirements of this section.

Cal. Educ. Code § 52720 (West 1989).

In addition, the Elk Grove Unified School District Rule AR 6115 states, "Each elementary school class [shall] recite the pledge of allegiance to the flag once each day."

"[T]he content of a public school's curriculum may not be based on a desire to promote religious beliefs." *See, Allegheny*, 492 U.S. at 591 n. 40. Teachers and other school officials lead children daily in the affirmation of the current form of the Pledge of Allegiance in Petitioner's school as required by a local rule adopted because of a state statute. Children of minority faiths and nonreligious children that attend public schools throughout the country face a similar practice.

B. A Child Might Not Exercise His Or Her Right To Opt Out Of The Pledge Of Allegiance Due To Fear Of Exposure As An Outsider Or Because Of Lack Of Capacity.

Those children educated in public schools who come from polytheistic, nontheistic, or nonreligious backgrounds face a daunting challenge: They must actively participate in reciting the Pledge of Allegiance, stand or sit quietly with the unlikely hope that no one notices, or excuse themselves from the room, thus exposing their status as religious minorities. By making a private conviction public, children are subjected to almost certain ridicule and judgment by both their peers and authority figures.[14]

While in *Barnette* this Court attempted to protect religious minorities by allowing them to opt out of reciting the Pledge, it did not go far enough to protect children affected by alienation and indoctrination. Despite this theoretical right to opt out, the

[14] Newdow stated in his initial complaint: "It was found that it is not possible to accomplish such an opt out without his daughter and her classmates realizing that she is an outsider." Pl.'s Orig. Compl. ¶ 101 (Mar. 8, 2000) (internal quotations omitted).

state nonetheless indirectly coerces these children to conform to majoritarian standards:

> As we have said in the context of officially sponsored prayers in the public schools, "prescribing a particular form of religious worship," *even if the individuals involved have the choice not to participate*, places "indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion."

Marsh, 463 U.S. at 798 (Brennan, Marshall, JJ., dissenting) (quoting *Engel*, 370 U.S. at 431) (emphasis added).

Even with this theoretical alternative of opting out, the likelihood of children taking such an opportunity is slim. Children are influenced by their environment, which in this case includes compulsory attendance under the watchful eyes of their teachers.[15] Children in fact may choose *not* to opt out, despite their religious beliefs, because they do not wish to stand out among their peers, because they fear reprimand from their teacher for noncompliance,[16] or because they do not wish to

[15] This Court has considered such criteria in the past when striking down religious acts in public schools that amounted to an endorsement of religion. While striking down the Creationism Act in *Edwards*: "The State exerts great authority and coercive power through *mandatory attendance requirements*, and because of the *students' emulation of teachers as role models* and the children's susceptibility to peer pressure." *Edwards*, 482 U.S. at 584 (emphasis added); *e.g. Wallace*, 472 U.S. at 61 n. 51 ("'[when] the power, prestige and financial support of government i placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.' *This comment has special force in the public-school context where attendance is mandatory.*" (quoting *Engel v. Vitale*, 370 U.S. 421, 431 (1962) (emphasis added)).

[16] "[O]ne morning, I did not stand up for [the Pledge] ... Immediately after the Pledge, my teacher reprimanded me and insisted that I stand for the length of the Pledge even if I did not recite it. Standing in front of the class in this manner was humiliating. I felt embarrassed, angry and alienated from my peers." State. Robin Lee Jacobs, Appendix 1.

appear unpatriotic and have no outlet to express such patriotism to their peers other than the current version of the Pledge. This Court held in *Lee*, as well as in *Santa Fe*, that a graduation ceremony with voluntary attendance and football games, respectively, were environments worthy of applying the coercion analysis. Surely compulsory school attendance, even with the theoretical alternative of opting out, would require such Constitutional review as well.

Also, a child may be too young and impressionable to decide whether to proclaim the Pledge of Allegiance. As this Court stated in *Wallace*:

> "That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and *non-conformity is not an outstanding characteristic of children*."

Wallace, 472 U.S. at 61 n. 51 (quoting *McCollum v. Bd. of Educ.*, 333 U.S. 203, 227 (1948) (Frankfurter, J., concurring) (emphasis added)).

Simply put, children themselves may not possess the ability to refuse reciting the Pledge. Their capacity to make independent choices concerning their religious upbringing, particularly in the elementary school context present in this case, is at best unclear.[17] This Court, for instance, found that the

[17] *See, Good News Club v. Milford C. Sch.*, 533 U.S. 98, 115 (2001). ("'symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are *the function of environment* as much as of free and voluntary

children in *Lee*, who were of high school age, could be coerced into participating in a religious act. In the case now before the Court, which involves elementary students as well as those in secondary school, the need for coercion analysis is amplified.

C. Children Are Subject To Indoctrination By The State, As They Are Vulnerable In The Absence Of Their Parents.

A young child's willingness to proclaim the Pledge of Allegiance may not necessarily coincide with the wishes of that child's parent or parents. Parents place children into public schools with the understanding that the school will not religiously indoctrinate them:

> Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary.

Edwards, 482 U.S. at 584.

Those that do not wish their children to recite the Pledge of Allegiance – the religious minority – are left little recourse. Even if a parent does not wish her or his child to recite the Pledge due to its religious meaning, no guarantee exists that the child will not pledge anyway, and thus become indoctrinated into the majority, monotheistic culture without his or her parent's consent or knowledge. State coercion surrounds the

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choice.'" (quoting *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985) (emphasis added)).

Pledge of Allegiance, and neither students nor their parents can sufficiently avoid it.[18]

This Court decided *Barnette* before it adopted the public school coercion test in *Lee*. *Barnette* did not adequately consider the repercussions of a child not reciting the Pledge, or the possibility that the child, regardless of his or her polytheistic or nontheistic background, may not opt out at all, despite the wishes of that child or his or her parents. Furthermore, since 1954, the Pledge has become a religious act for all students, not just Jehovah's Witnesses. Therefore, *Barnette* does not adequately protect religious minorities who wish to opt out of the Pledge, and those students currently have no adequate recourse to avoid coercion by the state to recite the Pledge with willing students from majority religions.

III. The Current Version Of The Pledge Of Allegiance Endorses Religion (Specifically Monotheism) And Therefore Violates The Establishment Clause.

The current version of the Pledge of Allegiance also fails the more traditional modified-*Lemon*, or endorsement, test. While the Ninth Circuit ultimately chose only to apply the coercion test in its analysis, this Court may apply either test or both in its own analysis.[19]

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[18] This assumes, of course, that the dissenter should even *have* to take such measures to avoid an establishment of religion. The idea that "the objector, not the majority ... must take unilateral and private action to avoid compromising religious scruples ... turns conventional First Amendment analysis on its head." *Lee*, 505 U.S. at 596.

[19] The Ninth Circuit expressed such flexibility in its own analysis ("We are free to apply any or all of the ... tests, and to invalidate any measure that fails any one of them.") *Newdow II*, 328 F.3d at 487. This Court also has "repeatedly emphasized [its] unwillingness to be confined to any single test or criterion in this sensitive area." *Lynch*, 465 U.S. at 679.

The addition of "under God" by Congress, as well as the justification for the use of the current version of the Pledge in schools, fail the purpose prong of the endorsement test, which "'asks whether government's actual purpose is to endorse or disapprove of religion.'" *Edwards*, 482 U.S. at 585, *Wallace*, 472 U.S. at 56 n. 42 (both quoting *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring)). Furthermore, the Pledge as used in public schools fails the effect prong, which "'asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval.'" *Id.* Finding *either* warrants invalidating the use of the current version of the Pledge in public schools. *Id.*

A. The Court Should Use A "Reasonable Nonadherent" Standard When Evaluating Whether The Current Form Of The Pledge Of Allegiance Violates The Endorsement Test.

The current reasonable person standard used by the Court in the endorsement analysis is flawed. It presupposes two misplaced assumptions: 1) that the reasonable person is aware of the historical context behind the state's unquestionably religious conduct[20] and 2) that the reasonable person is inured against majoritarian tendencies.[21]

[20] "'[T]he endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from ... discomfort ... It is for this reason that the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious [speech takes place].'" *Good News Club*, 533 U.S. at 119 (quoting *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 779-80 (1995) (O'Connor, concurring in part and concurring in judgment)).

[21] "To ensure the efficacy and neutrality in the application of [a] pure endorsement test, care must be taken to ensure that the objective observer's viewpoint is not tainted with majoritarian tendencies." Charles Gregory Warren, *No Need to Stand on Ceremony: The Corruptive Influence of Ceremonial Deism and the Need for Separationist Reconfiguration of the Supreme Court's Establishment Clause Jurisprudence*. 54 Mercer L. Rev. 1669, 1712 (2003) (internal citations omitted).

Those affected in this case – children of polytheist religious and nontheist backgrounds – meet neither assumption. One cannot expect children to understand the complex (and highly debatable) historical reasons behind why they recite the current version of the Pledge at the beginning of every schoolday. Many parents do not know the rationale behind it, either, other than the idea that it is expected of American citizens to do so.

Furthermore, the very people that the endorsement test is intended to protect – "outsiders" of minority faiths – are not factored into the analysis of a reasonable person. They should in fact be the sole basis for forming such a standard, for religious minorities are the ones most negatively affected by a state endorsement of religion. In sum, the Court should re-evaluate its use of the reasonable person standard in the endorsement test to assure that it does not impose majoritarian influences onto religious minorities.

B. The Current Version Of The Pledge Of Allegiance Fails The Purpose Prong Of The Endorsement Test.

When determining whether the purpose behind a law is to endorse religion, "the question is 'what viewers may fairly understand to be the purpose.'" *Allegheny*, 492 U.S. at 595 (quoting *Lynch*, 465 U.S. at 692 (O'Connor, J. concurring)). The government violates the Establishment Clause by generally promoting religion over nonreligion, or by promoting one particular religious belief over all others. *Edwards*, 482 U.S. at 585. A religious belief does not necessarily mean a particular sect. Monotheism encompasses a religious belief shared by many religious groups.

In short, the primary purpose of a statute must be secular in nature. The requirement for a secular purpose "is not satisfied ... by the mere existence of some secular purpose, however dominated by religious purposes." *Lynch*, 465 U.S. at 691 (O'Connor, J., concurring). The secular purpose must instead be the dominant force behind the legislative action. Furthermore, the secular purpose purported by the government must "be sincere and not a sham." *Edwards*, 482 U.S. at 587.

This Court must consider two distinct legislative actions. First, it must evaluate the intent of Congress in modifying the Pledge in 1954. It also must determine whether the purposes behind the adoption of the Pledge by Petitioner as a daily patriotic ritual were in fact secular.

1. The Intent Of Congress In Modifying The Pledge Of Allegiance In 1954 Was Clearly To Endorse Theism Over Nontheism In Violation Of The Establishment Clause.

To invalidate the 1954 addition of "under God" to the Pledge of Allegiance as used in public schools,[22] this Court must determine that the legislative purpose itself was religious, not just the motives of the legislators who passed the statute. *Board of Educ. v. Merges*, 496 U.S. 226, 249 (1990).

Congress changed the Pledge pursuant to lobbying by the Knights of Columbus and other religious parties. Pl.'s Orig. Compl. ¶ 27, Br. *Amicus Curiae* Knights of Columbus at 1. Furthermore, statements entered into Congressional records clearly show that the reason for adding "under God" was not to

[22] *Amici* support the original Ninth Circuit decision, *Newdow v. U.S. Congress (Newdow I)*, 292 F.3d 466 (2002), which invalidated the current version of the Pledge of Allegiance in all contexts. As this Court, however, has limited its consideration of the issue to the use of the Pledge in public schools, *Amici* too will limit analysis to such.

simply acknowledge the religious beliefs of the Founders or to counter communism, as Petitioner and its *amici* claim:

- "An atheistic American ... is a contradiction in terms." 100 Cong. Rec. 2, 1700 (Feb. 12, 1954) (Statement of Rep. Louis C. Rebaut, chief sponsor of the Act of 1954).

- "[T]he inclusion of God in our pledge ... further acknowledge[s] the *dependence* of our people and our Government *upon the moral directions of the Creator*. At the same time it would serve to deny the *atheistic* and materialistic concepts of communism." H.R. Rep. No. 83-1693 at 1-2 (1954) (emphasis added).

- "[T]he children of our land, in the daily recitation of the [P]ledge in school, will be daily impressed with a true understanding of our way of life and its origins." H.R. Rep. No 83-1693, at 3 (1954) (statement of Representative Louis C. Rabaut).

Furthermore, President Dwight D. Eisenhower said of the revised Pledge of Allegiance:

> From this day forward, the millions of our school children will daily proclaim in every city and town, every village and rural schoolhouse, *the dedication of our Nation and our people to the Almighty*.

100 Cong. Rec. 7, 8618 (1954) (statement of Sen. Ferguson incorporating signing statement of President Eisenhower) (emphasis added).

One cannot discount these statements as mere motives of certain legislators. The intent to indoctrinate children with monotheism at a time of great antipathy toward atheism is clear.

Congress amended the Pledge to reflect a *current and active* "dependence" upon a Creator. Furthermore, both Congress and the President targeted public school children in particular with such indoctrination.

It is unnecessary to explore whether the Founders intended that Congress may acknowledge the history of religion in this country, for that clearly was not the true intent of the 1954 Congress in modifying the Pledge. The Pledge in any form was unknown to the Framers of our Constitution. Thompson, 38 Harv. C.R.-C.L. L. Rev. at 577. Public education also did not exist during the drafting of the First Amendment.[23] Furthermore, just how the Founders intended the interpretation of the religion clauses of the First Amendment is unclear at best.[24] Even if the actions of the Founders and the First Congress did not explicitly express support for an absolute wall between church and state, this does not necessarily indicate that they did not intend such when they drafted the Amendment.[25] While *Amici* take issue with assertions that our country was founded on Godly grounds, that must be neither proven nor disproven in this case.

[23] "[A] historical approach [similar to that used to justify legislative prayer in *Marsh*] is not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted." *Edwards*, 482 U.S. at 583 n. 4.

[24] "Conclusions about the history of the religion clauses seem inevitably to support their authors' normative views about how the clauses should be applied today. Accordingly, many scholars have sensibly conceded that the history is inconclusive." Thompson, 38 Harv. C.R.-C.L. L. Rev. at 583.

[25] "Legislators, influenced by the passions and exigencies of the moment, the pressure of constituents and colleagues, and the press of business, do not always pass sober constitutional judgment on every piece of legislation they enact, and this must be assumed to be as true of the Members of the First Congress as any other." *Marsh*, 463 U.S. at 814-15 (Brennan, Marshall, JJ., dissenting).

The legislative purpose behind revising the Pledge in 1954 clearly violates the Establishment Clause. Congress intended to endorse a current belief in God, not to acknowledge a historical one by the Founders. In doing so, Congress and the Executive Branch both specifically targeted children to inculcate with this monotheistic message.

2. Petitioner Does Not Achieve Any Secular Purpose By Using The Current Version Of The Pledge Of Allegiance.

While Petitioner likely did not adopt the daily use of the Pledge of Allegiance with the intent to religiously indoctrinate children, that is nonetheless the effect. Further, while Petitioner seemingly adopted the use of the Pledge of Allegiance for secular purposes, the current version does not accomplish these secular purposes as well as the pre-1954 version.

First, as mentioned *supra*, reciting the Pledge on a daily basis is not comparable to learning a historical document like the Declaration of Independence. As this Court stated in *Barnette*, "we are dealing with a compulsion of students to declare a belief. They are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means." *Barnette*, 319 U.S. at 631.[26]

[26] The Court in *Barnette* cited a study published in the *Journal of Education Research*, which painted "'a rather pathetic picture of our attempts to teach children not only the words but the meaning of our Flag Salute.'" *Barnette*, 319 U.S. at 632 n. 12 (quoting Olander, *Children's Knowledge of the Flag Salute*, 35 J. Educ. Research 300, 305). A former elementary school teacher describes her experience: "In a civics lesson, my children might have learned that oaths are solemn promises of serious intent, never sworn casually. Instead, they innocently and blindly swore the Pledge each day, hands on heart, for no reason other than that I – their authority figure, placed there by the state – led them." State. Mary Ellen Sikes Appendix 2.

Second, such a ritual, despite the contention of the National School Board Association, does *not* unite children who recite the current version of the Pledge on a daily basis. Br. *Amicus Curiae* National School Boards Association at 16.[27] In fact, the exact opposite is accomplished for children of polytheistic and nontheistic backgrounds. For these children to feel "united" under such a ritual, they would have to participate in violation of their beliefs. Similarly, the argument that the Pledge is somehow meant to garner respect for religious differences is also untenable, for only those who follow a monotheistic faith, and feel comfortable pledging to a "nation under God," will feel respected. The Catholic League stated it best in its *amicus curiae* brief:

> [T]he recitation of the pledge with the phrase 'under God,' especially by our youngest citizens ... encourages continuing recognition of the idea of *God-given freedom* – the very principle that *unites* Americans as a people.

Br. *Amicus Curiae* Catholic League at 2 (emphasis added).

Lastly, while the current form of the Pledge of Allegiance satisfies the statutory need for patriotism in the school system, it does so only because of the content of the original, pre-1954 version of the Pledge. "[T]he availability or unavailability of secular alternatives is an obvious factor to be considered in deciding whether the government's use of a religious symbol amounts to an endorsement of religious faith." *Allegheny*, 492 U.S. at 618 n. 67. This particular secular purpose – to foster patriotism in the young – can not only be accomplished with the original version of the Pledge, but would be *better*

[27] It also states that "the ultimate mission of public schools [is] to create a patriotic, informed, and unified citizenry." Br. *Amicus Curiae* National School Boards Association at 10. The current version of the Pledge accomplishes none of these objectives better than the original version.

accomplished by it as it includes more patriotic citizens – including those of polytheistic and nontheistic backgrounds – in its overall statement. Linking patriotism with religious belief is an antithesis to the American ideal of individual liberty. If the purpose of the Pledge is to instill patriotism, it is inappropriate to tie such a purpose to a statement of religious belief.

C. The Current Version Of The Pledge Of Allegiance Fails The Effect Prong Of The Endorsement Test.

While finding religious endorsement in only one of the two prongs in violation of the Establishment Clause is required to invalidate a law, the current version of the Pledge of Allegiance fails the effect prong of the endorsement test as well. When evaluating the effect of a law on endorsing religion:

> [This Court] must ascertain whether "the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by nonadherents as a disapproval, of their individual religious choices."

Id. at 597 (quoting *School Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985)).

Practices that either intentionally or unintentionally "make religion relevant, in reality or public perception, to status in the political community" fail this analysis. *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring). By exposing outsiders who cannot say the current version of the Pledge because of its religious content, the inclusion of "under God" indeed brings religion into the public school classroom in an intimidating fashion. Students who are singled out due to their inability to pledge allegiance to their country will be disfavored over those who support the majority religious belief in our society: monotheism. Thus, one religious belief has been endorsed over

other religious beliefs as well as nonreligion, in violation of the Establishment Clause.[28]

IV. Current First Amendment Jurisprudence Is Unfairly Biased In Favor Of Majority Religious Beliefs At The Expense Of Religious Minorities.

Even if this Court finds under established First Amendment jurisprudence that the current version of the Pledge of Allegiance does not violate the Establishment Clause under either the coercion or the endorsement tests, justice dictates that it reconsider its analysis with consideration for the Constitutional rights of religious minorities.

The tests developed by this Court work in theory; "when rigorously enforced, [they] have been instrumental in helping unpopular religious minorities, including non-believers, resist majoritarian impulses to force them into second-class status." Thompson, 38 Harv. C.R.-C.L. L. Rev. at 587. However, as currently enforced, these tests infuse majoritarian ideals into their analysis to the detriment of polytheists and nontheists.[29]

[28] If this Court allows the Pledge of Allegiance to remain unchanged, it must also define "God," which itself would have Establishment Clause implications.

[29] *See* Thompson, 38 Harv. C.R.-C.L. L. Rev. at 579 ("Many expressions of support for the historical acknowledgement theory of the Establishment Clause are sprinkled with an unmistakably favorable view of religion (theism in particular), coupled with either hostility or blindness toward the place of nonbelievers (or even more broadly, nontheists) in American society."); Prof. Peter Brandon Bayer, *Is Including "Under God" in the Pledge of Allegiance Lawful?: An Impeccably Correct Ruling*, 11 Nevada Lawyer 8, 10 (2003) ("the intolerant may practice invidious discrimination against atheists, agnostics and members of non-traditional faiths, emboldened by what they perceive to be governmental policy of favoring the mainstream religious among us.").

A. Supreme Court Analysis Should Refrain From Unfairly Favoring Monotheists At The Expense Of Polytheists And Nontheists, And Adhere To The Court-Stated Purpose Of The Establishment Clause.

While 86% of the United States population believes in God, and another 8% believe in a universal spirit or higher power, 6% don't believe in either.[30] Given 1999 population estimates, that amounts to more than 16 million people.[31] This is more than the number of Jewish and Muslim populations in the United States combined.[32] Nontheists outnumber Jehovah's Witnesses – the religious sect that this Court attempted to protect in *Barnette* – 14 to 1 in the United States.[33] This number does not take into consideration those of polytheistic religions. Hindus, for example, believe in many gods.

Despite past assurances by this Court that the religious rights of "the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism" are protected under the First Amendment, *Wallace*, 472 U.S. at 52, people from such faiths nonetheless cannot enjoy the privileges of the majority when the Court recognizes a Christian theme to our history and society:

[30] Survey by the Gallop Organization for CNN/*USA Today* (December 9-12, 1999).

[31] U.S. Census Bureau, Population Estimates Program, Population Division (June 28, 2000).

[32] The Graduate Center of the City University of New York, *American Religious Identification Survey* (2001).

[33] In 2000, approximately 988,500 Jehovah's Witnesses resided in the United States. Encarta Encyclopedia Standard 2004.

> [T]hose in the majority who have their religious beliefs incorporated unto the entire society via governmental endorsement have no incentive to be tolerant of nonadherents because they have essentially been assured by the government of the rectitude of their views.

Warren, 54 Mercer L. Rev. at 1716.

Therefore, a reasonable request to recognize the dominant faith of those of majority religions "may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy." *Lee*, 505 U.S. at 592.

Furthermore, this Court and others have dismissed the views of atheists in favor of the monotheists.[34] Despite the aim of our Constitution to protect the minority from the tyranny of the majority, current First Amendment jurisprudence disappoints the minority.

B. The Constitution Adapts To Social Change When To Do Otherwise Leaves Many Americans Without Constitutional Rights.

This Court has interpreted the Constitution to adapt to the changing attitudes and norms of Americans. "[T]he

[34] *See, e.g., Zorach*, 343 U.S. at 313 ("A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: 'God save the United States and this Honorable Court.'"); *see also*, Thompson, 38 Harv. C.R.-C.L. L. Rev. at 579-80 ("The dissent in *Newdow* is ... dismissive of nonbelievers who challenge their second-class status, stating that the Pledge is only objectionable 'in the fevered eye' of those who would seek to drive all religion out of public life ... The message to nonbelievers: if you complain, you are overly fastidious, fevered, and febrile." (quoting *Newdow I*, 292 F.3d at 614 (Fernandez, J., concurring in part and dissenting in part)).

Constitution is not a static document whose meaning on every detail is fixed for all time by the life experience of the Framers." *Marsh*, 463 U.S. at 816 (Brennan, Marshall, JJ., dissenting). The Court has rejected practices once considered acceptable by Americans, "including gender discrimination, racial segregation, denials of jury trials, cruel and unusual punishment, and unreasonable searches and seizures." Thompson, 38 Harv. C.R.-C.L. L. Rev. at 585.[35]

In sum, the "heritage of official discrimination against non-Christians has no place in the jurisprudence of the Establishment Clause." *Allegheny*, 492 U.S. at 604-05. Yet religious minorities and atheists continue to suffer from such discrimination by the majority. One only needs to look at both the governmental and public backlash against the Ninth Circuit after announcing its decision in *Newdow I* to see how important government recognition of monotheism is to some, despite its effect of invidious discrimination against those of the imposition of minority faiths.[36] Such a reaction could not possibly have been provoked unless the majority feared that government recognition of the imposition of their religious

[35] The author of this article also poignantly stated, "one cannot imagine that having children recite 'one nation under white male rule' would be permitted as a mere historical reference." Thompson, 38 Harv. C.R.-C.L. L. Rev. at n. 202.

[36] Both the United States Senate and House of Representatives overwhelmingly approved resolutions condemning the ruling. H. Res. 459, 107th Cong., 148 Cong. Rec. 125-4136 (June 27, 2002), S. Res. 292, 107th Cong., 148 Cong. Rec. S6105-6106 (June 26, 2002). Senate Majority Leader Tom Daschle called it "nuts," and Senator Robert Byrd called the Justice who wrote the opinion "stupid." Carl Hulse, *Lawmakers Vow to Fight Judge's Ruling On the Pledge*, New York Times A20 (June 27, 2002). President George W. Bush called the decision "out of step with the traditions and history of America" and that "America is a nation ... that values our relationship with an Almighty." *U.S., Russia Continue Joint Efforts to Fight Terrorism*, The White House *(June 2002)* <http://www.whitehouse.gov/news/releases/2002/06/20020627-3.html>.

beliefs is now threatened. Meanwhile, religious minorities and nontheists stand unprotected, in clear violation of the Establishment Clause.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX 1

Written Statement of Robin Lee Jacobs of the AHA

I, Robin Lee Jacobs, do declare as follows:

I attended a public high school in Atlanta, Georgia. When I was in ninth or tenth grade, circa 1997, morning announcements included a moment of silence and a recitation of the Pledge of Allegiance to the flag. The moment of silence had just been introduced, controversy had erupted when a teacher was fired for refusing, and prayer circles were held around the flagpole each morning before school.

During the Pledge of Allegiance, everyone was required to stand, although students were not required to recite the Pledge. My homeroom teacher took the moment of silence very seriously; you would be in serious trouble if you made a peep. I was a good student, and teacher approval meant a lot to me. I can not remember exactly when I stopped reciting the Pledge; suffice to say that, as my beliefs developed, I went through phases where I recited it in its entirety when I was very young, recited it without saying, "under God," and then stopped reciting it altogether.

Finally, one morning, I did not stand up for it. I had not completely thought through the action, but I believed that I should not have to stand up in unison during the recitation of words I did not believe in, given the basic understanding of freedom of religion I had at the time. Immediately after the Pledge, my teacher reprimanded me and insisted that I stand for the length of the Pledge even if I did not recite it. Standing in front of the class in this manner was humiliating. I felt embarrassed, angry and alienated from my peers.

At the time, I was an atheist in a sea of southern Baptists. I had struggled several times with religious freedom. In seventh

grade, I objected to the required singing of "From a Distance" because it mentioned God. The only other atheist peer I had was unwilling to speak up, and so I found myself, as I often did, alone in my convictions. While I was successful in my objection (they opted for a different song), the decision did not meet with the approval of my peers. I often struggled to fit in because the local Baptist churches hosted many of the social events, including team sports. The requirement of standing for the Pledge further gave government approval to my peers' exclusion of me because of my atheistic beliefs.

I have always had a deep respect for religious belief, and I even later went on to study religion and philosophy in college. At the time of this incident, I held my beliefs just as closely as my Christian peers did. Even though I was young, I was deeply reflective. While I do not remember all of my feelings, I saved letters I had written to friends explaining why I did not believe in God. I expressed feelings of tolerance for their beliefs, and begged that they treat me likewise. I attended the local Unitarian Universalist church and was fascinated by religious experience. I carefully read the Bible, as well as books on the world's religions (my favorite was Huston Smith's ***The World's Religions***). But it was still very difficult for me to overcome my feelings of anger from this time period of my life, and sometimes I still find myself bitter because of the way I was treated in a country where freedom of religion is supposedly held so dear.

I declare under penalty of perjury under the laws of the State of the District of Columbia that the foregoing is true and correct.

Executed on November 26, 2003 at Washington, DC.

APPENDIX 2

Written Statement of Mary Ellen Sikes,
Former Elementary School Teacher

For seven years in the 1990s, I was employed in various instructional positions in the public schools of Albemarle County, Virginia. During approximately half this time, my duties required me to either lead morning exercises or assist disabled students in their participation. Morning exercises in this school system include the Pledge of Allegiance as amended by Congress in 1954, followed by a minute of silence mandated by Virginia Code Section 22.1-203 and upheld by the Virginia Court system.

My active participation in these daily exercises was then, and remains now, a source of internal conflict centered around deep-seated ethical principles inspired by my worldview. From my vantage point as a state employee entrusted with the care and education of its youngest citizens, my leading the Pledge by state mandate required me to choose between my professional duties and the Constitutional freedoms of my students; between a peaceful standing in my school community and the exercise of my own Constitutional rights; and between my school's standards of learning and a daily practice requiring children to abandon the critical thinking and free inquiry demanded of them in every other setting. There were no correct choices; each bore a price for someone.

I am a humanist, considered by some to be a religious or spiritual identity and by others a secular one. I view it as my right and obligation to create meaning in my life and to develop a moral framework that aspires to the greater good of all. I count it as humankind's responsibility to advance the human condition using reason and compassion. I expect to enjoy but one life, which I attempt to live fully and honestly. I see no

convincing evidence for a supernatural realm and, as a matter of intellectual integrity, avoid words and actions which would imply otherwise. I respect the right of all Americans to choose their own beliefs, and to express those beliefs fully whenever doing so does not jeopardize others' free exercise.

Central to my worldview is the principle of individual autonomy in matters of personal freedom and liberties of conscience. I celebrate the pluralistic nature of our society and hold dear the government's mandate to preserve and protect the freedoms of the most diverse citizenry on earth. I consider myself patriotic: I have held a civil service position requiring a top security clearance; I vote; I volunteer in my community. My family has a rich history of public service: my brother served in Southeast Asia in the 82nd Airborne, my uncle in World War II, and my father and mother both in government careers.

This is the background I brought to my academic job, where on a daily basis I was required to lead my children in the public swearing of an oath called the Pledge of Allegiance. Even the ablest of these 4- to 9-year-olds could have no true understanding of the momentousness of such an action. In a civics lesson, my children might have learned that oaths are solemn promises of serious intent, never sworn casually. Instead, they innocently and blindly swore the Pledge each day, hands on heart, for no reason other than that I – their authority figure, placed there by the state – led them.

I was there to show them how to position their bodies, where to fix their eyes, and what to say in rote unison – words that were neither theirs nor mine, but had been established by their government as the orthodox expression of patriotism. My students were to repeat this ritual 180 times per school year for 13 years – two thousand, three hundred forty Pledges per child, not counting athletic and extracurricular events.

In 1954, a time of terrible religious intolerance when the U.S. government systematically persecuted people like my own humanist heroes, Helen Keller and Corliss Lamont, Congress amended the religiously neutral Pledge to include a God reference. The intent was to consciously (although inaccurately) affirm a collective belief that would distance the nation from Communist ideology. In dividing Communist from non-Communist, however, Congress also divided religious majorities from minorities, creating a favored citizenry of those with specific kinds of beliefs.

As a humanist, I cannot hear (let alone recite) the amended version of the Pledge without personally experiencing, each time, the alienating motivation behind Congress's action. In school, I was required by my state to start each day with this official reminder, delivered to me through my children, of my government's displeasure with citizens like me who dare to believe differently from the majority.

No God is big enough to fill the cavernous gap created by striking the word "indivisible" from the Pledge of Allegiance. The God Congress chose to inject into the Pledge at the expense of national unity is the monotheistic God of Christianity and Judaism. This was the God of many, but not all, of my students; many, but not all, school employees. Still, I was required every morning to place this God "over" the nation I call my own, and do this along with my class, as if we did all agree on this rather central issue, as if this God should simply be assumed the "correct" one, in total conflict with belief systems holding otherwise, including mine and others present in my room.

I could never escape the feeling that I was acting dishonestly by playing a role in this pretense of religious conformity, hypocritically modeling to my class beliefs I did not hold and conditioning them to unquestioningly assume religious homogeneity. Worse, I felt I was allowing my government to use me to unconstitutionally influence my

students' spiritual lives, foster bigotry, harden them against religious diversity, and skew their notions of the relationship between religion and government.

Leading the Pledge to "one nation, under God" associates patriotism with theistic belief in a child's mind. It implies that there is an official God of the United States government and its public schools, and that those who dissent are something less than real citizens at best, traitors at worst. It acts out the untruth that government has a right to tell Americans what to say about that God, and when and how to say it. It links the Judeo-Christian God with positive ideals like liberty and loyalty and justice, inviting children to the logical but prejudiced conclusion that religious minorities and the non-religious fall on the side of tyranny, disloyalty and injustice.

It builds the foundation for weak civic choices in adulthood, when political candidates who fail to exhibit familiar, state-approved, Pledge-like views about religion are likely to be seen as "outsiders" to be mistrusted and certainly not elected, regardless of their leadership credentials. All this happens in the one setting where we might expect extra care to be taken to model open inquiry and a vigorous interpretation of the First Amendment: the public schools where we educate our children to become citizens worthy of the U.S. Constitution. If minority students and staff cannot be free of the divisive specter of religion in our tax-supported schools, then where?

Children are easily conditioned to ritual but not always able to understand the context. On one occasion a child told me at the beginning of morning exercises, "But I don't feel like praying now!" Since there was never any mention of prayer associated with the minute of silence (its saving grace in Court), I can only assume that the words "under God" in the Pledge, taken with its ritualistic execution, caused this little boy to think he was being led in prayer each morning. For him and others holding the same perception, injunctions against school-sponsored worship are meaningless.

As an educator, I could never view the Pledge as anything but coercive in practice, however many accommodations may exist in theory. Young children are unable to distinguish between non-conformity that is likely to be punished and non-conformity that is theirs to practice by right, and older children know all too well that non-conformity of any sort will be seen as trouble by the vast majority of teachers. In some schools, the reading of the Pledge over the intercom would completely rule out any reasonable accommodation of a dissenting student. In every school, the social and academic consequences of self-exclusion would be significant. By what right does Congress create a daily First Amendment dilemma for the nation's schoolchildren?

Never did a child ask me to be excused from the Pledge exercise, any more than a child would ask not to have her lunch choice sent to the cafeteria or not to sit in morning circle for show-and-share. Classroom rituals are designed to teach children cooperation, order and teamwork, but for a teacher the line between promoting those values and abusing a child's fundamental need for social acceptance is easily crossed. Even had my children been told they could opt out of the Pledge, it would be the rare 7-year-old who would ask to be singled out from the most conspicuous school-wide ritual of the day. Likewise, it would be the rare parent who would set his child apart from his friends, making him the "squeaky wheel" student no teacher wants assigned to her class.

Nor did I ask to be excused myself, a decision I second-guess even to this day. Doing so would probably have resulted in a legally correct but socially and professionally disastrous accommodation involving a daily substitute. I chose instead to carry out this professional obligation to keep the peace, to ward off public attention and parental disapproval, to avoid having to explain my ethical conflict to children too young and tender to understand it in any way other than personally, to spare my

principal and superintendent the discomfort and trouble of dealing with my complaint, to be an easy employee to keep around during budget cuts, and to escape the proselytism of my supervising teacher and other co-workers (a fear for which there was precedent).

There was a time when I shrugged off ceremonial references to religion as harmless traditional observances. I ignored the parts which were at odds with my lifestance, proud of my flexibility and open-mindedness. During my teaching years, that view altered dramatically. My students were taught to approach life with thought and attention, to choose their words and actions carefully, and to stand by their principles; how could I defend a ritual that demanded the opposite from me, from all of us, in order to be bearable? I came to see the Pledge of Allegiance as nothing less than coercive government exploitation of my students' innocence and of my position of authority in their classroom: a violation of both their rights and mine.

The Pledge is defended as a "tradition," part of our "heritage." I taught in a building whose traditional heritage was all about the scourge of racial inequality: it had been one school in a separate County system that served children of color prior to integration. The Courts eventually saw the "tradition" of separate-but-equal as untenable; they discarded legal precedent to rid schools of segregation's legacy, forcing my state kicking and screaming into the dawn of Civil Rights. Despite public outcry and the pain of learning new ways, *Brown* was the right decision. It's my conviction that the Pledge "tradition" deserves the same brave turnaround.

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